BOOK REVIEWS.

THE SUPREME COURT AND UNCONSTITUTIONAL LEGISLATION. By BLAINE FREE MOORE. Columbia Studies in History, Economics and Public Law, Vol. LIV, Number 2. New York: COLUMBIA UNIVERSITY; LONGMANS, GREEN & Co., Agents. 1913. pp. 159.

THE FOURTEENTH AMENDMENT AND THE STATES. By CHARLES WALLACE COLLINS. Boston: LITTLE, BROWN & Co. 1912. pp. xxi, 220.

It would be not wholly unfair to characterize as unscientific much of the current criticism levelled at the judiciary. The induction on which it is based is seldom of the widest. Attention has in the main been confined to a few instances which best illustrate the possibility of harm from judicial control over legislation. The two books under review illustrate a different attitude. Within their respective fields they deal with all the decisions in which statutes have been nullified and thus indicate the evils which the courts have averted as well as the blessings they have postponed.

Mr. Moore has catalogued in his appendices all of the cases in which the Supreme Court has declared a legislative enactment unconstitutional and has presented in his text a detailed consideration of the thirty-three decisions in which an Act of Congress has been held invalid. Seven of these are classified as relating to laws disturbing the constitutional position of the three departments of the federal government, in six of which the court was merely resisting an increase of its own jurisdiction. Twelve of the decisions are found to involve statutes disturbing federal relations and encroaching upon the powers of the states. Mr. Moore suggests that in the first Employers' Liability Cases and in *Keller* v. *United States,* the court "has hampered Congress in its attempt to solve two pressing economic and social problems," but he does not venture to assert that the legislation there inhibited was within the powers delegated to Congress rather than among those reserved to the states. It seems hardly fair to criticize the court, even by implication, because the federal system created in 1787 was not in every way adapted to the needs of 1910. Mr. Moore seems also guilty of an obvious error in insisting that in the Civil Rights Cases the court "has greatly increased its own authority under the Fourteenth Amendment." It was the Fourteenth Amendment which increased the subject matters over which the federal judicial power extends, by imposing new restrictions upon the powers of the states. The court merely limited the power of Congress more than the radical reconstructionists deemed necessary.

Only eleven decisions are found in which statutes of Congress were nullified because of encroachment upon individual civil rights, and for most of these, says the author, the court is to be commended. He suggests that *Adair* v. *United States* is "probably diametrically opposed to the spirit of freedom supposed to be guaranteed by the first ten amendments," but treats *Boyd* v. *United States* and *Counselman* v. *Hitchcock* more leniently than Professor Wigmore has done. Of the decisions not within the preceding groups none are of present importance. The first Legal Tender Decision was soon reversed by the court and the Dred Scott Case and the Income Tax Decisions have been rendered nugatory by constitutional amendments. These decisions

which have failed to stand the test of time involve constitutional provisions couched in terms too vague and indefinite to indicate clearly their concrete meaning and application. Possibly this marks the realm in which the judges may wisely look for guidance to public sentiment. But the record of the Supreme Court in dealing with statutes of Congress is on the whole little open to criticism. The result of Professor Moore's analysis is the more valuable because of his manifest inclination to judge the decisions by the desirability of the legislation nullified rather than by drily logical considerations. His exposition harmonizes in the main with the conclusions of Mr. Warren in the April number of this REVIEW (Vol. XIII pp. 294-313).

It is to be hoped that the author will continue his investigation and present an analysis of the cases in which state statutes have been held invalid. In his appendices he has set forth these decisions, both chronologically and according to the states from which appeal was taken. He has also classified them on the basis of the constitutional clauses which the enactments in question were found to violate. In the 246 decisions in which state statutes or municipal ordinances have been nullified, 79 have been found obnoxious to the power of Congress to regulate commerce, 78 to the limitation against impairing the obligation of contracts, 19 to the requirement of due process, 5 to that of equal protection and 4 to the *ex post facto* clause. In 41 of the decisions no specific constitutional clause is referred to, but these relate mostly to encroachment by the states on the powers conferred upon the national government. Another profitable field for the expansion of the author's study is indicated in Appendix III which summarizes the decisions in which statutes have been sustained. Of a total of 904, 185 cases sustained statutes of Congress, 646, statutes of a state, while 73 involved municipal ordinances.

A portion of these fields which Professor Moore has surveyed but not cultivated has been tilled by Mr. Collins. He has enumerated chronologically the 604 decisions in which the Supreme Court has passed upon the Fourteenth Amendment, and dealt in detail with the 55 decisions in which state action was inhibited. His main interest lies in showing the effect of the amendment upon the federal system of government. As the important provisions of the amendment were already contained in the state constitutions, its only novel feature was to shift "the guarantor from the State to the Federal Government." Although in 1872 the Supreme Court doubted "whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision," only 28 of the 604 decisions have concerned the negroes as a class, of which 22 were decided adversely to the party aggrieved. The only result to the negro from the amendment conceived primarily for his benefit has been the theoretical but practically unsubstantial right to be tried by a jury from which members of his race have not been excluded on account of their color. On the other hand, a corporation has been the principal party in 312 of the 604 decisions handed down under the amendment and in 39 of the 55 instances in which relief was obtained. Mr. Collins presents on pages 31-33 a list of representative questions raised under the amendment, to buttress his contention that the problems are seldom of more than local concern. In most instances, he insists, the question before the court is one, not of law, but of governmental policy. The enormity of the situation is thus expressed:

"Five men have the power to declare null and void, on the ground of governmental policy, a State law, which is upheld by four members of the Supreme Court of the United States, the unanimous opinion of the Supreme Court of the State; the majority—or even unanimous—opinion of both houses of the State legislature; and by the public opinion of the State at large."

This bogey, however, appears utterly chimerical from the author's own enumeration of the instances of federal intervention which have actually taken place. It is interesting to note that of these 55 interventions, 11 were by virtue of the equal protection clause, of which 6 involved the right of negroes to sit on juries; "fourteen were made under the equal protection and the due process of law clauses considered together; and the remaining thirty were made under the due process of law clause alone, two as deprivations of liberty without due process of law, and twenty-eight as taking property without due process of law."

Mr. Collins, who is a member of the Alabama bar, displays no regret that the Amendment has accomplished little of its conceived purpose. He evidently would not have sorrowed deeply had it accomplished nothing at all. He is strikingly emancipated from that cast of thought sometimes slightingly referred to as the "lawyer's attitude," and from any passion for the closer approximation to harmony which may result from centralized and unified judicial control. As a substitute for the repeal of the amendment, which he considers impracticable, he suggests that Congress amend the Judicial Code so as to permit the Supreme Court to entertain writs of error from state courts in cases involving the Fourteenth Amendment only when the state court was divided in opinion, and to declare a state statute unconstitutional under the amendment only by unanimous opinion. He would deprive the inferior federal courts of all power to "assume, by virtue of the Fourteenth Amendment, jurisdiction of any injunction, *habeas corpus,* or any other high or extraordinary proceedings by way of restraint upon, or intervention into, the activities of the States." These changes, it is urged, would relieve the Supreme Court of an ever-increasing burden and would eliminate the waste of time and money involved in litigation under the amendment in which nine out of every ten litigants fail to gain the relief requested. They would also restore home rule to the states. "Had there been a rule requiring the unanimous opinion of the Supreme Court before intervening in the affairs of a State, only twenty-four instances of restraint would have been thus put upon the States since the adoption of the Amendment, the most of them being of minor importance."

The main value of these studies lies in the attempt, however imperfectly executed, to take stock of conditions as they actually are. The American system of judicial control over legislation is now before the bar of popular judgment. The issue raised by the clash between myopic veneration and loose abuse must be determined by a sane and discriminating empiricism. We are still on the threshold. We need careful accounts of the practical results of the control exercised by all our courts under both state and federal constitutions. We need an equally impartial analysis of the merits and defects of law-making by legislatures and by direct action of the electorate. Not until this has been achieved, can we best know what to do and how to do it.

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